

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JAFET CHAVEZ,)
)
 Petitioner,)
 vs.) Case No.: 2:10-cv-00234-GMN-LRL
)
 ANTHONY SCILLIA, et al.,) **ORDER**
)
 Respondents.)
)

On November 10, 2010, the Court dismissed without prejudice this *pro se* petition for a writ of habeas corpus. (ECF No. 20). Judgment was entered on November 12, 2010. (ECF No. 21). Before the Court is petitioner's motion for relief from judgment, which was filed January 20, 2011 (ECF No. 23).

I. MOTION FOR RELIEF FROM JUDGMENT

Where a ruling has resulted in final judgment or order, a motion for reconsideration may be construed either as a motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e) or as a motion for relief from judgment pursuant to Federal Rule 60(b). *School Dist. No. 1J Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993), *cert. denied* 512 U.S. 1236 (1994).

Under Fed. R. Civ. P. 60(b) the court may relieve a party from a final judgment or order for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which

1 it is based has been reversed or otherwise vacated, or it is no
2 longer equitable that the judgment should have prospective
3 application; or (6) any other reason justifying relief from the
operation of the judgment.

4 Motions to reconsider are generally left to the discretion of the trial court. *See*
5 *Combs v. Nick Garin Trucking*, 825 F.2d 437, 441 (D.C. Cir. 1987). In order to succeed
6 on a motion to reconsider, a party must set forth facts or law of a strongly convincing
7 nature to induce the court to reverse its prior decision. *See Kern-Tulare Water Dist. v.*
8 *City of Bakersfield*, 634 F. Supp. 656, 665 (E.D. Cal. 1986), *aff'd in part and rev'd in*
9 *part on other grounds* 828 F.2d 514 (9th Cir. 1987). Rule 59(e) of the Federal Rules of
10 Civil Procedure provides that any "motion to alter or amend a judgment shall be filed no
11 later than 10 days after entry of the judgment." Furthermore, a motion under Fed. R. Civ.
12 P. 59(e) "should not be granted, absent highly unusual circumstances, unless the district
13 court is presented with newly discovered evidence, committed clear error, or if there is an
14 intervening change in the controlling law." *Herbst v. Cook*, 260 F.3d 1039, 1044 (9th Cir.
15 2001) (quoting *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999)).

16 In its November 10, 2010 Order, this Court determined that petitioner's grounds
17 for habeas relief were unexhausted in state court and dismissed the petition without
18 prejudice to allow petitioner to return to state court to exhaust, should he so desire.

19 In the motion for reconsideration, petitioner claims that the Court's decision "was
20 the result of the many false, unfounded claims purported in Respondent's Answer to
21 Petitioner's federal writ." (Mot. 1, ECF No. 23.) Petitioner contends that his claims were
22 fairly presented to the state courts but that those courts acted negligently or in error in
23 denying relief. Such arguments are unpersuasive and fail to address the core issue: the
24 claims were not presented in a procedural context which would have allowed for proper
25 consideration of the claims on their merits. As the record indicates, the Nevada Supreme

1 Court denied petitioner's motion for sentence modification, specifically holding that the
2 claims raised were outside the narrow scope of permitted issues-- i.e., that the sentence
3 was based on mistaken assumptions about the defendant's criminal record which worked
4 to the defendant's extreme detriment. (See Ex. 13, Mot. to Dismiss, ECF No. 13.)

5 Without extraordinary circumstances, a motion for reconsideration that merely
6 advances new arguments, or supporting facts that were available at the earlier filing, is
7 inappropriate. *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).
8 Because petitioner has not presented any extraordinary circumstance and attempts to
9 advance arguments that were available at the time the motion to dismiss was still
10 pending, this motion for reconsideration shall be denied.

11 **II. CERTIFICATE OF APPEALABILITY**

12 In order to proceed with an appeal from this court, petitioner must receive a
13 certificate of appealability. 28 U.S.C. § 2253(c)(1). Generally, a petitioner must make "a
14 substantial showing of the denial of a constitutional right" to warrant a certificate of
15 appealability. *Id.* The Supreme Court has held that a petitioner "must demonstrate that
16 reasonable jurists would find the district court's assessment of the constitutional claims
17 debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

18 The Supreme Court further illuminated the standard for issuance of a certificate of
19 appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The Court explained that:

20 We do not require petitioner to prove, before the issuance of a
21 COA, that some jurists would grant the petition for habeas
22 corpus. Indeed, a claim can be debatable even though every
23 jurist of reason might agree, after the COA has been granted and
24 the case has received full consideration, that petitioner will not
25 prevail. As we stated in *Slack*, "[w]here a district court has
rejected the constitutional claims on the merits, the showing
required to satisfy § 2253(c) is straightforward: The petitioner
must demonstrate that reasonable jurists would find the district
court's assessment of the constitutional claims debatable or
wrong."

1 *Id.* at 1040 (quoting *Slack*, 529 U.S. at 484).

2 The Court has considered the issues raised by petitioner, with respect to whether
3 they satisfy the standard for issuance of a certificate of appeal, and the Court determines
4 that none meet that standard. The Court will therefore deny petitioner a certificate of
5 appealability.

6 **CONCLUSION**

7 **IT IS THEREFORE ORDERED** that the Motion for Relief from the Judgment
8 (ECF No. 23) is **DENIED**.

9 **IT IS FURTHER ORDERED** that the clerk shall **ENTER JUDGMENT**
10 **ACCORDINGLY**.

11 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE**
12 **OF APPEALABILITY**.

13 DATED this 6th day of April, 2011.

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16 Gloria M. Navarro
17 United States District Judge

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